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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

Dear Ms. Searcy:

On behalf of Capital Cities/ABC, Inc., transmitted herewith for filing with the Commission are an original and five copies of its Comments in MM Docket No. 92-259.

If there are any questions in connection with the foregoing, please contact the undersigned.

Sincerely,

Kristin C. Gerlach

KCG/ak
Enclosures

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List A B C D E

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the Cable	)	
Television Consumer Protection	)	MM Docket No. 92-259
and Competition Act of 1992	)	
	)	
Broadcast Signal Carriage Issues	)	

COMMENTS OF CAPITAL CITIES/ABC, INC.

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January 4, 1993

TABLE OF CONTENTS

SUMMARY

PART 1 -- MUST-CARRY REGULATIONS

The Commission should treat the entire geographic area served by a cable system as the system's "location" in implementing §614(h)(1)(A) of the 1992 Cable Act. In the case of a cable system located in more than one ADI, the Commission should treat stations in both ADIs as qualified for must carry status.

The Commission should accommodate ADI changes only once every three years to coincide with broadcast stations' three-year "must carry/retransmission consent" election under the Act. "Freezing" ADIs in this manner will provide stability and serve the legitimate reliance interests of the parties.

We support the Commission's proposed petition for special relief procedure for adding or subtracting communities from a station's television market. We believe that cable operators should not be permitted to file such requests in order to avoid the potential for a proliferation of nonmeritorious "negative" requests.

We believe that the Commission should use the ADI standard to replace the list of Major Television Markets in §76.51 of its rules and that this standard should be applicable to network non-duplication and syndicated

exclusivity as well as to the determination of "local" signals under the compulsory copyright license.

We agree with the Commission that a source-neutral approach should apply in defining "substantial duplication" for purposes of §614(b)(5) and we believe that 50% of a station's prime time viewing hours is the appropriate benchmark.

The Commission should adopt a broad definition of "program-related material" in implementing §614(b)(3). We agree with the Commission that the WGN Continental Broadcasting factors should serve as a model and we request that the Commission clarify that vertical blanking interval material related to commercials in the broadcast program is "program-related."

In resolving disputes regarding channel positioning, the Commission should establish a priority structure based on what is least confusing and disruptive to the public. Priority to over-the-air channel position best advances this principle, except for all-UHF markets where the cable channel position as of January 1, 1992 should apply.

PART 2 -- RETRANSMISSION CONSENT

The Commission should adopt an expansive definition of "multichannel video programming distributor" consistent with the broad language of the Act and the supporting

legislative history. Parity in treatment among competing multichannel distributors furthers the goal of fostering a competitive marketplace. The scope of the compulsory copyright license is irrelevant to the definition of multichannel distributor because the Act and the copyright statute deal with two separate bundles of rights.

We believe that there is an appropriate role for the Commission to play in handling signal piracy complaints and in enforcing the "unserved household" restriction which underpins the exception to retransmission consent found in §325(b)(2)(C). A Commission remedy would be more realistic for broadcasters than the bringing of lawsuits, and the questions presented clearly fall within the Commission's expertise.

The Commission should take the opportunity to clarify that the §76.62 obligation to carry programs "in full" means that all commercials in or adjacent to the program must be carried as well.

We agree that the Commission's tentative conclusion that the provisions of §614, including the requirement that a cable operator carry a station's entire program schedule, apply only to stations exercising must-carry rights. Stations electing retransmission consent should not be restricted as to the terms of carriage they are permitted to negotiate, including which programs are to be carried. This interpretation is fully supported by the language of the Act

and is consistent with the basic principle that the parties should have flexibility to negotiate the arrangement that best meets their needs in light of competitive necessities.

The Commission should rule that the Act does not preclude stations from contracting with program suppliers with respect to their retransmission consent rights. The plain language of §325(b)(6) dictates this result and nothing in the purposes of the Act or the legislative history even remotely suggests that Congress intended to circumscribe relations between program suppliers and stations regarding retransmission consent rights.

In construing §325(b)(6), the Commission should remove any doubt that network affiliation contracts with television stations constitute "video programming licensing agreements." Finally, the Commission should make explicit that broadcasters are not required, as a condition of exercising retransmission consent, to obtain permission from copyright holders. The Act and legislative history make clear that the retransmission authority created by the Act is a separate and distinct interest from the interests of copyright holders. Accordingly, absent a specific contractual arrangement, the statute does not constrain the broadcaster's exercise of retransmission consent.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-259
	)	
	)	
Broadcast Signal Carriage Issues	)	

To: The Commission

COMMENTS OF CAPITAL CITIES/ABC, INC.

Capital Cities/ABC, Inc. ("Capital Cities/ABC") submits herewith its Comments in response to the Notice of Proposed Rule Making in the above-entitled proceeding ("Notice").[1] The Notice requests comment on implementation of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act" or the "Act"). Our interest in this proceeding is based on our major financial stake in both broadcasting and cable. Capital Cities/ABC owns the ABC Television Network and eight television broadcast stations, as well as a majority interest in ESPN and minority interests in the Arts and Entertainment and Lifetime cable program services. In addition, for several years we have publicly expressed our interest in exploring opportunities for cable

[1] MM Docket No. 92-259, Notice of Proposed Rule Making, FCC 92-499 (rel. November 19, 1992).

system ownership. Our comments are divided into two parts, the first on must-carry regulations and the second on retransmission consent.

PART 1 -- MUST-CARRY REGULATIONS

I. Definition of Local Commercial Station and Definition of Television Market.

The Commission at paragraphs 17-20 of the Notice requests comment on a number of issues relevant to the definitions of "local commercial television station" and "television market." Among these are its proposal to add the definition of "local commercial television station" found in §614(h)(1)(A) of the 1992 Cable Act to its rules; the method for determining the location of a cable system; how to treat cable systems located in more than one market; how to accommodate changes in Arbitron's Areas of Dominant Influence (ADIs) from year to year; what factors to evaluate when considering requests to add or subtract communities from a station's television market; and how the Major Television Markets List found in §76.51 of the Commission's rules should be modified. These issues are addressed in turn below.

A. Definition of "Same Television Market" to Determine "Must Carry" Status.

Section 614(h)(1)(A) of the Act defines a local commercial television station as "...any full power television broadcast station ... licensed ... by the Commission that,

with respect to a particular cable system, is within the same television market as the cable system." Section 614(h)(1)(C) defines a broadcasting station's market as its ADI (it does so by referring to the market determinations under the Commission's multiple ownership rules in §73.3555(d)(3)(i)). That section gives the Commission discretion to modify a television market through the addition or exclusion of communities from the ADI upon "expedited consideration" following a written request.

These two provisions of the 1992 Cable Act should be read together, since they are designed to achieve the same result -- that is, with respect to each cable system, to delineate which broadcast stations are in the "same market" as the cable system and thus entitled to "must-carry" status.

In implementing §614(h)(1)(A), the Commission requests comment on whether the location of the cable system should be treated as the place where its principal headend is located or whether it should be the entire geographic area served by the cable system. In implementing §614(h)(1)(C), the Commission requests comment on the treatment of cable systems located in more than one ADI.

Both questions deal with what happens at the margins in implementing a statute that clearly makes the ADI the general rule in determining the "same market." We believe the answer to both questions that is most consistent with the general rule is, in the case of the location of a cable

system, using the entire geographic area served as its location and, in the case of a cable system that is located in more than one ADI, treating stations in both ADIs as qualified for must carry status on the system. To the extent this results in a greater number of "must carry" stations than would result if the "same market" determination were made on a station-by-station, cable system-by-cable system basis, the Cable Act provides some relief for cable operators by providing that a cable operator is not required to carry the signal of any local commercial television station that "substantially duplicates" the signal of another station carried on its system. Moreover, the cable operator's maximum must-carry obligation, regardless of the number of eligible stations, is one-third of its usable activated channels.

B. Modifications to the ADI.

The Commission requests comment on two issues related to changes in the ADI: (1) how to accommodate sporadic changes in the ADI as a result of shifts in "dominant influence" in various counties; and (2) the procedure to be followed under §614(h)(1)(C), which permits the Commission to add communities to or subtract communities from a station's television market.

First, although ADI boundaries may vary as a result of changed viewing patterns, adequate stability can be achieved through "freezing" the geographic limits of all ADIs

for a period of time. In this way, the parties' legitimate reliance and expectation interests would not be frustrated, and they could conduct sales and other negotiations with the knowledge that the relevant television market would remain constant for a specified period.[2] We believe that changed ADI designations should be recognized once every three years, to coincide with broadcast stations' three-year "must-carry/retransmission consent" election under the Cable Act.

Second, with respect to the procedure to be followed under §614(h)(1)(C), we support the Commission's view that requests to add or subtract communities from a station's television market should be filed as petitions for special relief under §76.7 based upon the Commission's prediction that this procedure would offer more expedited consideration than treating the requests under the rulemaking procedures.[3] We think all of the factors listed in §614(h)(1)(C)(ii) are potentially relevant to the determination of whether a community should be added or deleted from a station's market. We do not believe it would be wise for the Commission to adopt a specific mileage limit or, at least at the outset, any specific formula relating to a station's over-the-air

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[2] This is the procedure currently followed in connection with the Prime Time Access Rule, 47 C.F.R. §73.658(k). The top-50 markets subject to the Rule are determined on the basis of the average of the prime time audience figures for each market listed in specified Arbitron audience surveys. Those markets remain constant for a period of three years for purposes of the Rule.

[3] Notice at paragraph 19.

viewability.[4] Since Congress has sought through the special request procedure to afford a means for taking into account distinctive situations not recognized by a particular Arbitron ADI designation, the Commission should give itself as much latitude as possible in evaluating the particulars of each such request.

The Commission also asks for comment on whether cable operators as well as broadcast stations should be permitted to file such requests. We believe that cable operators should not be permitted to file such requests and that the Commission should also clarify that broadcast stations are permitted only to request changes to their own market definitions -- not to the market definitions of other broadcast stations.[5]

If cable operators and competing broadcast stations were permitted to file requests aimed at specific television stations, there would be considerable potential for a proliferation of nonmeritorious "negative" requests, which would burden broadcasters, tax the Commission's resources and slow down the evaluation process for all requests -- both meritorious and nonmeritorious. At the same time, §614's

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[4] The absence of a specific formula is no detriment to the cable operator since the cable operator is not required to carry a station that does not deliver a suitable quality signal to the system. (§614(h)(1)(B)(iii).)

[5] Cable operators and other stations should be permitted to respond to a broadcaster's special request.

policy objective of serving localism would be fully realized through a procedure whereby special requests are accepted only from affected broadcast stations: Congress has determined that ADIs should be the basic market definition, subject to whatever modifications are necessary in individual areas to ensure that local viewing patterns or community ties are appropriately recognized. In instances where a broadcaster believes it is serving a community outside of its ADI, such that it should have signal carriage rights on cable systems serving that community, the broadcaster -- more than a cable operator or a competing broadcast station -- will have the incentive to file a special request to have the community added to its market definition. Conversely, if an ADI definition "overstated" a station's actual market, the fact that cable operators or competing stations could not petition for reduction of the station's market would cause no unfairness nor would it conflict with §614's purposes. Pursuant to §614(b)(2) cable operators within the ADI would not be required to carry the station, only to include the station in the group of local stations from which they chose which signals to carry (assuming the total number of local commercial television stations exceeded the maximum number of

signals the system was required to carry).[6] Moreover, the Act protects the cable operator against must-carry of stations that arguably are outside the system's market in its requirement in §614(h)(1)(B)(iii) that the station deliver a suitable quality signal to the system.

C. §76.51 List of Major Television Markets.

The Commission notes, at paragraph 21 of the Notice, that §614(f) of the 1992 Cable Act requires it to update the list of Major Television Markets in §76.51 of its rules "as part of the implementation of these must-carry provisions." Section 76.51 appears to have no direct effect on must-carry implementation, however, since the Act clearly designates the ADI as the relevant geographic market for determining local television stations entitled to "must-carry" status.

Rather, as the Commission notes, the consequence of modifying the §76.51 list appears to be three-fold. First, changes in the list would change the maximum geographic scope of exclusivity stations could assert against cable importation of duplicating broadcast programming under the syndicated program exclusivity and network non-duplication rules (47 C.F.R. §§ 76.151 and 76.92). Second, it would change the maximum geographic scope of exclusivity stations could bargain

[6] It should also be borne in mind that the ADI already reflects Arbitron's judgments, based on measurable patterns of television viewing, of which counties belong in which ADIs. In general one would expect these judgments to be more objective than claims made by cable operators or competing television stations.

for as against other broadcast stations (47 C.F.R. §73.658(m)). Third, cable operators' liability for royalty payments under the cable compulsory copyright license would be affected, to the extent the Copyright Office uses the list to determine which stations are "local" for that purpose. In each of these cases, a mileage criterion is applied to named communities in the §76.51 list to determine the local zone of exclusivity against cable importation of duplicating broadcast programming or exclusivity against other broadcast stations (under Commission regulations) or the local station's service area (for the cable compulsory license). The list is largely based upon prime time household ratings data that is more than twenty years old and does not reflect current Arbitron market designations. For this reason, and others discussed below, we believe that the Commission should adopt a single, uniform standard for the network non-duplication and syndicated exclusivity rules, as well as for determining "local" signals under the compulsory license -- the ADI (as modified through the "expedited consideration" procedure to reflect existing market realities). A uniform standard would also serve the salutary purpose of simplifying the Commission's rules and avoiding the conflicts that would inevitably result (and which would require the expenditure of Commission resources to resolve) from different definitions of local market. Accordingly, the Major Television Markets list in §76.51

should be eliminated for these purposes,[7] along with application of the 35-mile and 55-mile zones.[8]

1. Network Non-duplication and Syndicated Exclusivity.

As we previously urged in Reply Comments in Gen. Docket No. 87-24,[9] we believe that the ADI should be used as the appropriate limitation on exclusivity. The ADI is a geographic area defining a local television market. Determination of an ADI is based on objective statistical data reflecting viewing patterns. Each county in the United States is assigned to one ADI, so that there is no overlap.[10] It is generally recognized that the ADI is a "basic measuring stick of the television marketplace"[11] that generally defines a television station's local arena of competition.

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[7] In place of outright elimination, the §76.51 list could be modified to reflect the current Arbitron ADI list, "frozen" for three-year periods, as suggested above.

[8] We do not comment at this time on the propriety of eliminating or replacing this list in connection with the non-network territorial exclusivity rule. In examining this issue, the Commission will wish to consider whether it continues to be necessary to have a rule to assure stations in small and overshadowed markets access to programming.

[9] Reply Comments of Capital Cities/ABC, Inc. In the Matter of Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity and the Cable and Broadcast Industries, Gen. Dkt. No. 87-24 (filed February 3, 1989).

[10] Description of ADI Methodology, Page 1.

[11] Comments of BHC, Inc. and United Television, Inc. in Gen. Dkt. 87-24 (filed January 17, 1989) at 11.

The House Committee agrees with this analysis:

> The Committee recognizes that ADI lines establish the markets in which television [stations] buy programming and sell advertising. ...The Committee believes that ADI lines are the most widely accepted definition of a television market and more accurately delineate the area in which a station provides local service than any arbitrary mileage-based definition.[12]

The Report also takes note of the Commission's ability to "make an adjustment to include or exclude particular communities ... to ensure that television stations be carried in the areas they serve and which form their economic market."[13]

In addition, the 35/55 mileage limitation should be eliminated. By protecting a local broadcaster against cable importation of duplicative programming, the cable exclusivity rules make it possible for a competitive program market to function as efficiently as is feasible under a compulsory license regime. In this regard, the goal is not only to allow a marketplace determination of the overall quantity and diversity of programs supplied, but also to allow the market to determine the structure of program distribution. Accordingly, we believe that the artificial 35/55 mileage limitation on the allowable zone of exclusivity is far too restrictive. It places an arbitrary and unrealistic

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[12] H. Rep. No. 628, 102nd Cong., 2nd Sess. 97 (1992) ("House Report").

[13] Id.

limitation on the parties' ability to structure their business arrangements in accordance with their view of competitive necessities in individual markets. Because the purpose of both the syndicated exclusivity and network non-duplication rules is the same, i.e., to replicate to the extent possible the exclusivity that normal marketplace negotiation would provide for each station in its own market, the geographic scope of protection should be the same for both network and syndicated programs.[14]

We favor retention of the "significantly viewed" exception to deletion of programming under the network non-duplication and syndicated exclusivity rules to protect smaller market stations, stations on the fringes of ADIs, and stations whose coverage areas overlap.[15] Audience in other than the station's home ADI is clearly taken into account in determining whether a television broadcast station is "significantly viewed" for purposes of the rule.

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[14] GEN. Docket No. 87-24, Comments of Capital Cities/ABC at 40-41 (filed July 22, 1987); Report and Order In The Matter of Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industry, 64 Rad. Reg. 2d (P&F) 1818 ("Syndex Order"), at 1859: "... network non-duplication rules and syndicated exclusivity rules are designed for the identical purpose: to enhance a broadcaster's competitive posture by allowing the exercise of exclusive rights to programming."

[15] See revised sections 47 C.F.R. §§76.92(f) and 76.156(a), which provide that a cable system is not required to delete the duplicating syndicated and/or network programming of any television broadcast station which is significantly viewed in the cable television community pursuant to 47 C.F.R. §76.54.

This protection, coupled with the ability of interested parties to petition the Commission to add or delete communities to television markets, ensures that the ADI standard is a realistic reflection of a station's market for the cable exclusivity rules.

2. Compulsory Copyright Implications.

The Commission notes its understanding, at footnote 24 of the Notice, that the Copyright Office would use a modified §76.51 list to determine liability under the cable compulsory copyright license, and requests comment on whether copyright implications of such changes should be considered.

We note first that elimination of the §76.51 list (or modification thereof to include the current ADI list, "frozen" for three years) is conceptually consistent with the compulsory license scheme. In general, cable operators incur no royalty payment liability for carriage of a television broadcast station within "the local service area of [that] primary transmitter."[16] Section 111(f) of the Copyright Act defines "local service area of a primary transmitter" (in the case of a television broadcast station) as:

> the area in which such station is entitled to insist upon its signal being retransmitted by a cable system pursuant to the rules, regulations, and authorizations of the Federal Communications Commission in effect on April 15, 1976.

[16] 17 U.S.C §111(d).

The §76.51 list has traditionally been used to determine that local service area.[17] Revision of the list in the way we suggest can be viewed as an update to reflect current market realities -- the ADI -- which the Congress has also determined to be both the best measure of local service area, and the area in which a broadcast station is entitled to insist upon its signal being retransmitted by a cable system under the 1992 Cable Act.[18]

The Copyright Office determined in an earlier action that a revised §76.51 list as the result of an FCC market redesignation order would be used to determine "local signals" for purposes of the cable compulsory license. That determination was based on its interpretations that: "(1) Congress did not intend §76.51 to be frozen to its April 15, 1976 status for purposes of determining cable systems' local service area and copyright royalty fees; and (2) when the FCC amends its major television market list in 47 C.F.R. §76.51, there has been no substantive rule change effected so as to impact calculation of the cable royalties."[19] While we

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[17] See, e.g., Policy Decision Concerning Federal Communications Commission Action Amending List of Major Television Markets, 52 FR 28362 (Copyright Office, July 29, 1987).

[18] House Report at 97. We do not believe, and do not suggest, that modification of the list in this fashion should affect a station's "local" status under the compulsory license if it is "significantly viewed" pursuant to Commission precedent or regulation.

[19] 52 FR 28362.

recognize that our suggested approach would expand the number of "local service area" signals (and thus reduce compulsory copyright royalty collections), it would likewise be the result of an updating of §76.51 to reflect current market realities rather than the result of any change of the substantive rule.

II. Substantial Duplication and Definition of Network.

Section 614(b)(5) of the Act provides that a cable operator is not required to carry the signal of any local commercial television station that "substantially duplicates" the signal of another local commercial television station carried on its cable system, or to carry the signals of more than one local commercial television station affiliated with a particular broadcast network. The Commission, at paragraph 26 of the Notice, requests comment on the appropriate definition of "network" in these circumstances. It recommends that the definition be based on the "substantial duplication" concept, and suggests a source-neutral approach, i.e., that the focus should be on the amount of duplicative programming involved, rather than on the source of that programming. The Commission also requests comment on the amount of duplication necessary for two stations' program schedules to be deemed to be "substantially duplicative."

We agree that the definitions should be source-neutral. As the Commission notes, the provision is intended to preserve both the cable operator's discretion and diversity of program choices for the viewing public. If the programming is duplicative, the source is irrelevant for diversity purposes.

We believe that fifty percent of a station's prime time viewing hours is the appropriate benchmark for the definitions of both "network" and "substantial duplication." Accordingly, a network would be defined as an entity that provides 14 hours of prime time programming per week on a regular basis to interconnected affiliates.[20] We do not believe that a nationwide coverage criterion is relevant for this purpose, since the importance of the "network" definition in this context is the amount of duplicative programming provided on a local basis. Similarly, a station's signal would "substantially duplicate" that of another station if fifty percent of its prime time programming were identical to that of the other station. This percentage is generally consistent with other Commission definitions of "duplication" mentioned in footnote 33 of the Notice (the percentage varies from roughly 40% to 50% based on the number of hours in the

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[20] "Prime time" for these purposes would be defined as it is under the Prime Time Access Rule, i.e., 7-11pm in the Eastern and Pacific Time Zones, and 6-10pm in the Central and Mountain Time Zones. "Prime time" would thus include a total of 28 hours per week.

differing definitions of "prime time").

We do not believe that programming must be simultaneously broadcast by the two stations involved in order to be "substantially duplicative."[21] Television networks from time to time license their affiliates to broadcast a program or program episode in a time period other than the one initially offered, and syndicated programs may air in a variety of different time periods from station to station.[22] Using prime time as the criterion (coupled with a reasonable outside time limit for broadcast of the program or program episode) would ensure that identical programs broadcast at different times would be sufficiently close in time to be

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[21] This criterion does not appear in the Cable Act. The House Report, however, indicates that "'substantially duplicates' is intended to refer to the simultaneous transmission of identical programming on two stations ... and which constitutes a majority of the programming on each station." House Report at p. 94. Despite this expression of intention in the House Report, the statute makes clear that the Commission is responsible for fashioning the implementing regulations for must-carry, and there is no directive that "substantially duplicates" be defined in any particular way (§614(f)). Had Congress meant to include such a directive, it would have done so. Section 325(b)(3)(B) states that the regulations established to implement the must-carry and retransmission consent provisions "shall include" specific requirements. There is no mention of "substantially duplicates" in that section. In addition, in other legislation, such as the Children's Television Act, Congress has explicitly directed that specific terms be included in the Commission's implementing regulations when it has so intended.

[22] In order to distinguish between current network series and off-network syndication of those series, we suggest that identical programs be identified by episode, rather than by overall series titles.

considered "duplicative" for purposes of the 1992 Cable Act.[23] As the Commission recently noted, the value of time diversity -- that is, having the same program available for viewing at different times -- has been substantially diluted with the recent introduction and proliferation of video cassette recorders:

> Importantly, time diversity in viewing obtained by the use of a VCR can be planned and made to fit the viewer's convenience, while reliance on duplicative imported signals may only fortuitously meet such needs.[24]

Accordingly, the effect (if any) on diversity is negligible.

III. The Commission Should Adopt a Broad Definition of "Program-Related Material" in Implementing Section 614(b)(3).

Section 614(b)(3) of the Act in part requires cable operators to carry "to the extent technically feasible, program-related material carried in the vertical blanking interval[.]" This section also permits a cable operator, in its discretion, to carry other non-program related material included in the vertical blanking interval ("VBI").

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[23] If the Commission were to decide that an outside time limit is necessary, we suggest a period of at least seven days to account for delayed broadcasts.

[24] Syndex Order at paragraphs 47, 113. The network non-duplication rules, which were the subject of that proceeding, protect local broadcasters against cable importation of duplicating network programming. In revising those rules, the Commission eliminated the requirement that programming be simultaneously broadcast in order to fall within the rule, and left the appropriate time period to be negotiated by the parties.